FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1942.

No. 750 18

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

v.

GEORGE A. KUBLER,
Respondent.

PETITION AND BRIEF

FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ELMER MCCLAIN,
Lima, Ohio,
Attorney for Thad Benson Carter,
Petitioner.

T. W. KIMBER,
503 Flatiron Building, Akron, Ohio.
Attorney for George A. Kubler,
Respondent.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

SUBJECT INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1
I. A Summary Statement of the Matter Involved	2
II. Statement of the Basis of the Jurisdiction of this Court	3
III. The Questions Submitted	3
IV. Reasons Relied Upon for Allowance of a Writ of Certiorari	5
BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI	8
I. No Report of the Decision Below	8
II. Grounds on Which the Jurisdiction of this Court Is Invoked	8
III. Statement of the Case	9
District Court Orders Conciliation Commissioner to Conduct Valuation Hearing	9
The Hearing Before the Conciliation Commissioner	10
Conciliation Commissioner's Report After Hearing	10
Petition for Review	10
The Judge's Memorandum Opinion	10
Final Order of the District Court	11
Application for Rehearing	11
Appeal	11
Final Judgment of the Appellate Court	11

Page

IV. Specification of Errors 12

V. Summary of the Argument 13

VI. Argument 15

This case involves the whole purpose of the Farmer Debtor law 15

The Mandate of the Statute Governing Valuation and the Method Employed 16

The Statute 16

The Method Employed 16

Devices to Defeat the Purpose of the Law 17

First Device:

The Price of Redemption 18

Second Device:

The Time for Redemption 20

Third Device:

Prohibition Against Farming 21

The Evidence on Value 22

Some Extrajudicial Evidence 22

The Method Condemned 23

A Look at the Mortgage Holder's Theory of Valuation 25

The Statutory Standard of Value 27

An Examination of the Evidence Submitted at the Hearing 29

The Mortgage-Holder's Evidence 29

The Evidence of Other Witnesses 30

The Two Valuation Theories Compared 33

Conclusion 34

Page

Case Index

Akron v. United States, 261 U. S. 184 ..... 6, 9, 25

Aughenbaugh, In re, 125 Fed. (2d) 887 ..... 6, 9, 25

Borchard v. California, 310 U. S. 311 18

Crowell v. Benson, 285 U. S. 22 ..... 6, 9, 25

Interstate Commerce Commission v. Louisville, 227 U. S. 88 ..... 6, 9, 25

John Hancock v. Bartels, 308 U. S. 180 ..... 6, 9, 18

Kalb v. Feuerstein, 308 U. S. 433 18

Moser v. Mortgage Co., 123 Fed. (2d) 423 ..... 5, 9, 23

Peterson v. John Hancock, 116 Fed. (2d) 148 ..... 7, 9

United States v. Abilene, 265 U. S. 274 ..... 6, 9, 25

Wright v. Union Central, 304 U. S. 502 ..... 9, 18

Wright v. Union Central, 311 U. S. 273 ..... 15, 18, 19, 27, 28, 34

Other Authorities.

Judicial Code, Section 240 (a) 3

Section 75 (s) (3) Bankruptcy Act 2, 15, 16, 18, 19, 23, 27, 34

Rules of Civil Procedure, Rule 62, 28 U. S. C. 874 21

IN THE

Supreme Court of the United States

OCTOBER TERM 1942.

NO.

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

v.

GEORGE A. KUBLER,
Respondent.

PETITION

For a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

The brief in support of this petition begins at page 8.

All emphasis in this petition and brief is supplied except where it is stated otherwise.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

A Summary Statement of the Matter Involved.

The question presented arises out of the redemption provisions of the farmer debtor law, Section 75 of the Bankruptcy Act, 11 U. S. C., Section 203. The applicable part of Section 75 (s) (3) provides that ". . . the debtor may pay into court the amount of the appraisal of the property . . . **Provided,** That upon request . . . the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and **after such hearing, fix the value of the property, in accordance with the evidence submitted,** and the debtor shall then pay the value so arrived at into court . . . and thereupon the court shall, by an order turn over full possession and title of said property . . . to the debtor".

After originally fixing the official valuation at $5800 earlier in the same proceeding under the first paragraph of Section 75 (s), the conciliation commissioner set it at $25,200 for redemption from mortgages of roughly the same amount. The judge upon review reduced it to $20,000.

No opinion was rendered by the appellate court. It merely entered its order, the substance of which reads: "it appearing that there was no abuse of judicial discretion" . . . "the judgments and orders" . . . "are in all things affirmed." This final order appears at R. 45.

II.

Statement of the Basis of the Jurisdiction of This Court.

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code; 28 U.S.C. 347 (a).

The petitioner has complied with Section 8 (a) of the Act of February 13, 1925; 28 U. S. C. 350. The final judgment of the court below (R. 45) became final on December 3, 1942, when a petition for rehearing was denied (R. 51). This petition is filed within three months thereafter.

III.

The Questions Submitted.

The questions are:

1.

In fixing the valuation at which a farmer debtor shall redeem his farm does the statutory provision in Section 75 (s) (3) that the court shall "set a date for hearing, and after such hearing, fix the value of the property, **in accordance with the evidence submitted,**" permit a conciliation commissioner to fix such valuation "upon a **personal investigation by the conciliation commissioner**" in addition to the evidence submitted to him at a hearing? R. 9, next to the last paragraph.

2.

May he fix such valuation contrary to the evidence by raising it from his own original official appraisal of $5800

in the same proceeding to a sum four and one-third times that amount, that is, to $25,200? R. 9, next to last paragraph (168 acres at $150 per acre, $25,200).

3.

In fixing such valuation may the conciliation commissioner consider the amount of liens against the farm?

4.

In view of the statutory provision in Section 75 (s)(3) that after a hearing the court shall fix the value "in accordance with the evidence submitted", may the court exercise a "judicial discretion" in fixing the value of the property?

5.

May a conciliation commissioner in an order fixing the value of a farmer debtor's farm under Section 75 (s)(3) fix approximately two months, expiring October 15, as the time for redemption and prohibit the farmer debtor from doing "any planting of any description until after October 15"? R. 9, bottom of page and R. 10, top of page.

6.

May the judge on petition for review of a conciliation commissioner's order fixing farm valuation for redemption under Section 75 (s)(3), excuse the increase of valuation from an original official appraisal of $5800 to $25,200 by the conciliation commissioner upon the ground that $5800 valuation "was made for taxation purposes", contrary to the statement of the conciliation commissioner in the record that "the former appraisement of Carter's farm in these proceedings was $5800", no different statement or evidence appearing in the record?

7.

May a court in fixing $20,000 as the valuation at which a farmer debtor should redeem his farm pursuant to Section 75 (s)(3), limit the time for such redemption to thirty days, and order that if redemption be not accomplished within such time the farm shall be sold?

IV.

Reasons Relied Upon for Allowance of a Writ of Certiorari.

1.

There is involved a question of importance in the interpretation and administration of a federal statute, Section 75 (s)(3) of the Bankruptcy Act, which relates to the method of redemption by a farmer debtor of his farm from secured debts.

2.

The decision of the appellate court in holding that the bankruptcy court had a judicial discretion in fixing the valuation is in direct conflict with the mandatory provision of Section 75 (s)(3) that the court shall "set a date for hearing, and after hearing, fix the value of the property, in accordance with the evidence submitted".

3.

The decision of the appellate court is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Moser* v. *Mortgage Company*, 1941, 123 Fed. (2d) 423. There also the conciliation commissioner fixed the value of the farm for redemption after hearing the evidence and "making a personal visit to the ranch and looking over the property". The appellate court for

the Second Circuit held in that case that the method pursued violated the statutory requirement that the court shall "fix the value of the property in accordance with the evidence submitted".

4.

The said decision of the Second Circuit Court of Appeals also held that the method of valuation followed by the bankruptcy court in the *Moser* case (which was the method followed in this *Carter* case) was in conflict with the decision in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180, where this court held that Section 75 (s) prescribes a definite course of procedure whereby the bankruptcy court shall set a date for hearing and thereafter fix the value of the property in accordance with the evidence which value the debtor shall pay into court to redeem his property.

5.

The decision of the appellate court below is in direct conflict with the decision of the Third Circuit Court of Appeals in *In re Aughenbaugh*, 1942, 125 Fed. (2d) 887, where, in a bankruptcy proceeding, the appellate court held to be invalid an order of a referee predicated upon the contents of papers not introduced at the hearing.

6.

The decision below is in conflict with the decision of this court in *Interstate Commerce Commission* v. *Louisville*, 1913, 227 U. S. 88, where it was held that the order involved was not based on evidence introduced at a hearing and consequently it was invalid. To the same effect were the decisions of this court in *Akron* v. *United States* (New England Division Case), 1923, 261 U. S. 184; *United States* v. *Abilene*, 1924, 265 U. S. 274; and *Crowell* v. *Benson*, 1932, 285 U. S. 22.

7.

In holding that the bankruptcy court had a "judicial discretion" to fix the sum at which a farmer debtor shall redeem his farm under Section 75 (s)(3) the order of the appellate court below is in conflict with the decision of the Eighth Circuit Court of Appeals in *Peterson* v. *John Hancock*, 1940, 116 Fed. (2d) 148, in holding that "The statute, as construed by the Supreme Court in the *Bartels* case, is explicit and mandatory, and the District Court had no discretion to act contrary to its terms", and holding that "judicial decision and not judicial discretion" is what is called for.

Wherefore your petitioner prays that a writ of certiorari issue to the Sixth Circuit Court of Appeals directing it to certify and send to this court a transcript of the record and proceedings thereon to the end that this cause may be determined by this court and for all other relief as may be proper.

Respectfully submitted,

ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner.

Lima, Ohio
February 6, 1943

BRIEF

In Support of the Foregoing Petition for a Writ of Certiorari.

The index precedes the petition for certiorari.

I.

No Report of the Decision Below.

The appellate court handed down no opinion. Its final order appears at R. 45. The Memorandum Opinion of the Judge of the District Court, which is not reported, appears at R. 35.

II.

Grounds on Which the Jurisdiction of This Court Is Invoked.

The statutory basis of the jurisdiction of this court has been stated at pages 3 and 4 of the preceding petition for certiorari.

The grounds relied upon for invoking the jurisdiction of this court have been set forth at pages 5, 6 and 7 of the preceding petition. To recapitulate them, they are: That an important question of the interpretation and administration of a federal state is involved, namely Section 75 (s) (3) which prescribes the procedure whereby a farmer debtor may redeem his farm from liens against it; that the decision of the appellate court below is in direct conflict with said statute; that said decision is in conflict with

the decision of the Second Circuit Court of Appeals in *Moser* v. *Mortgage Company*, 1941, 123 Fed. (2d) 423; that said decision is in conflict with the decision of this court in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180; that it is in conflict with the decision of the Third Circuit Court of Appeals in *In re Aughenbaugh*, 1942, 124 Fed. (2d) 887; with the decisions of this court in *Interstate Commerce Commission* v. *Louisville*, 1931, 227 U. S. 88; *Akron* v. *U. S.* (New England Division case), 1923, 261 U. S. 184; *United States* v. *Abilene*, 1924, 265 U. S. 274; and *Crowell* v. *Benson*, 1932, 285 U. S. 22, and in conflict with the decision of the Eighth Circuit Court of Appeals in *Peterson* v. *John Hancock*, 1940, 116 Fed. (2d) 148, which was based upon the decision of this court in the *Bartels* case.

III.

STATEMENT OF THE CASE.

District Court Orders Conciliation Commissioner to Conduct Valuation Hearing.

Following the decision of this court in the second case of *Wright* v. *Union Central*, 1940, 311 U. S. 273, holding that a farmer debtor's farm may not be sold under Section 75 (s)(3) until he has had an opportunity to redeem it at its appraised value, the bankruptcy court issued its order of March 21, 1941, directing the conciliation commissioner to have a hearing at which "the secured creditor be afforded an opportunity to present evidence as to the present fair value of such farm and that the conciliation commissioner determine the correct appraised value and fix a reasonable time within which the debtor shall redeem the farm from the mortgage lien". R. 8 to 9.

A Hearing Before the Conciliation Commissioner.

A hearing was held by the conciliation commissioner at which evidence was submitted by the secured creditor and by the farmer debtor. A narrative form of the evidence appears at R. 10 to 28. As the effect of this evidence is an important issue in this case, it is fully considered beginning at page 29 of the **Argument.**

Conciliation Commissioner's Report After Hearing.

The conciliation commissioner reported to the court that he conducted a hearing and "after hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the conciliation commissioner of the value of said farm I hereby fix the value of said farm at $150 per acre". ($25,200). R. 9.

Petition for Review.

The farmer debtor filed a petition for review (R. 29).

The Judge's Memorandum Opinion.

Upon review the judge issued his memorandum opinion reducing the valuation to $20,000, $119 per acre. R. 35. Referring to the conciliation commissioner's former appraisal of the fair and reasonable market value of the farm at $5800, $34.52 per acre, the opinion stated: "However, that value the commissioner stated was made for taxation purposes." There is **no such statement in the record.**

Final Order of the District Court.

The final order of the district court pursuant to the opinion of the judge fixed the valuation at $20,000, $119 per acre, and set the time for redemption at December 15, 1941. R. 37.

Application for Rehearing.

The farmer debtor filed an application for rehearing in which he set forth the affidavits of two of the three original appraisers, that originally in the same proceeding they had appraised the farm at $5800 which the said appraisers considered to be the then **fair and reasonable market value**; that said conciliation commissioner at the time when the appraisal was reported to him by said appraisers said that "$5800 was no more than the farm was worth and he expressed his agreement with the appraisers in fixing the appraisement of said farm at $5800." R. 39 to 41.

The petition for rehearing was denied. R. 41.

Appeal.

Following denial of the petition for rehearing an appeal was taken. R. 42.

Final Judgment of the Appellate Court.

Without opinion the appellate court affirmed the district court finding "there was no abuse of judicial discretion in the finding that the reasonable market value of the farm land in question was $20,000." R. 45.

IV.

Specification of Errors.

1.

The bankruptcy court based the valuation for redemption upon a personal investigation made by the conciliation commissioner wholly outside of the evidence submitted at a hearing held by the conciliation commissioner to determine such valuation.

2.

The bankruptcy court defeated the farmer debtor's federal statutory right of redemption by fixing a valuation contrary to the evidence submitted at a hearing.

3.

The bankruptcy court fixed a valuation for redemption at a price greatly in excess of the official valuation previously found by the court in the same proceeding, there being no evidence of any such increase in value.

4.

The bankruptcy court considered the amount of liens against a farm in fixing its valuation for the purpose of redemption from such liens as provided in the farmer debtor law.

5.

The appellate court held that a bankruptcy court may exercise a judicial discretion in fixing the value of a farm for redemption under the provisions of such law. The statute prescribes that the valuation shall be set at its fair and reasonable market value as disclosed by the evidence submitted at a hearing held for the purpose of determining such value.

6.

The bankruptcy court fixed a redemption value of $25,200 for farm real estate and limited the farmer debtor to a period of two months after such value was set within which to raise the required sum.

7.

The bankruptcy court prohibited the farmer debtor from operating his farm by ordering him not to do any planting of any description before the date set for redemption, such date being October 15.

8.

The bankruptcy court sustained an excessive valuation of the farmer debtor's farm for redemption by a conciliation commissioner by finding that the conciliation commissioner's former official valuation in the same proceeding was made for taxation purposes whereas there was no evidence to support such statement.

9.

The bankruptcy court limited to thirty days the time within which the farmer debtor should raise the sum of $20,000 set by the court as necessary to redeem his farm as provided by the farmer debtor law and ordered the farm to be sold upon failure to pay such sum within time.

V.

Summary of the Argument.

The questions presented here concern the very heart and center of the farmer debtor law. If the methods employed here are approved the entire purpose of the law is defeated. The redemption provisions of Section 75 are the culmination of the Act.

The statute definitely lays down the method of valuation. This court has repeatedly held that the statute prescribes an orderly procedure which is a mandate to be obeyed. The bankruptcy court violated the statute by preventing redemption through three devices: (1) the device of increasing the valuation up to the neighborhood of the liens and hiding the discrepancy between evidence and conclusion under the guise of "personal investigation"; (2) the device of setting the time for redemption too short for a farm real estate loan to be consummated; and (3) the device of ordering farming operations to stop—a sure way of defeating a loan.

The method employed has been repeatedly condemned by this court and by the other federal courts.

An examination of the evidence demonstrates the unlawful theory upon which the mortgage holders pressed upon the conciliation commissioner an inflated fictitious valuation made to measure up to the mortgage liens.

VI.

ARGUMENT.

This Case Involves the Whole Purpose of the Farmer Debtor Law.

The purpose of the farmer debtor law, like that of the other debtor laws for railroads, corporations and municipalities, is to keep the owner debtor in permanent possession of the mortgaged property. This is to be accomplished by payment to the security owner of the value of his security in place of permitting him to take the security itself. As this court has declared, "There is no constitutional claim of the creditor to more than that." *Wright v. Union Central*, 1940, 311 U. S. 273, 278.

The administrative machinery, adopted by statute and sustained by this court, to accomplish such purpose is comprised in the redemption provisions of these various statutes. In Section 75 these redemption provisions are embodied in Section 75 (s) (3), where it is provided that the farmer debtor may pay into court the value of his mortgaged property. This value is paid to the secured creditor. The mortgaged property is then free from all liens and the farmer debtor receives his discharge.

If this legal machinery is misused the purpose of the statute is defeated and all the antecedent procedure has been in vain. Of the redemption provisions those pertaining to fixing the valuation of the security are their core and center. If a fictitious inflated valuation is set, there can be no redemption and, as Lincoln said, "the law is cheated."

The statutory method set up in Section 75 and the method employed by the bankruptcy court in this case are therefore first presented.

The Mandate of the Statute Governing Valuation and the Method Employed.

The Statute.

"Such appraisers shall appraise all of the property of the debtor . . . at its **then fair and reasonable market value.**" Section 75 (s) first (unnumbered) paragraph: "upon request . . . the court shall cause a reappraisal . . . or in its discretion **set a date for hearing and after such hearing, fix the value** of the property, **in accordance with the evidence submitted.**" Section 75 (s) (3).

The Method Employed.

The concilation commissioner's increase of the farm valuation from his original official appraisal of $5800 to $25,200 (four and one-third times the original appraisal) was not determined by the evidence submitted. It was undoubtedly influenced by the fact that the first mortgage amounted to $34,702 and the second mortgage amounted to $2000 more. R. 26. R. 27, bottom of page.

Neither the concilation commissioner, the judge, nor the appellate court justified the increase on the basis of the evidence submitted at the hearing. The following statements illustrate the point:

The conciliation commissioner said (after stating that he heard the evidence and studied the briefs of the par-

ties): "and **upon a personal investigation** by the conciliation commissioner of the value of said farm, I hereby fix the value of said farm at $150 per acre" (168 acres at $150, $25,200). R. 9, bottom of page.

The judge upon review said (referring to the original $5800 appraisal by the conciliation commissioner in the same proceeding): "However, that value the commissioner stated, was made for taxation purposes." R. 35, bottom of page. This statement is not supported by any evidence. On the contrary the conciliation commissioner stated that "the former appraisement of Carter's farm in these proceedings was $5800". R. 26, bottom of page to top of page 27. No appraisal for taxation is provided or mentioned in Section 75.

The judge also stated: "it does seem to me the appraisal is high." R. 36, middle of page. "The buildings and fences are probably of little value for appraisal purposes and the timber land probably the same." R. 36, middle of page. "The testimony gives the impression that there is not an active market for farm land in this location." R. 36, bottom of page. "It is seriously doubted that such a market value [for a country place] ever will exist and it must be regarded as merely speculative." R. 37, top of page.

The appellate court: "there was no abuse of judicial discretion." R. 45.

Devices to Defeat the Purpose of the Law.

The ultimate purpose and the culmination of all the provisions of the farmer debtor law in Section 75 is the redemption of the farmer debtor's farm at its "fair and

reasonable market value" so that the farmer may be kept on the farm and the mortgage holder may have the value of his security.

This court made the purpose of the law very clear and protected it in *Wright* v. *Union Central*, 1940, 311 U. S. 273:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. . . . Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. . . . There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

In this statement appear the following citations: *Wright* v. *Union Central*, 1938, 304 U. S. 502. *John Hancock* v. *Bartels*, 1939, 308 U. S. 180. *Kalb* v. *Feuerstein*, 1940, 308 U. S. 433. *Borchard* v. *California Bank*, 1940, 310 U. S. 311.

In the neverending contest by which mortgage holders seek to defeat the purpose of the farmer debtor law there were employed in this instance three devices:

FIRST DEVICE

The Price of Redemption.

An Inflated Valuation Prevents Redemption.

The price of redemption in Section 75 is the "amount of the appraisal" (Section 75 (s) (3)) and the standard

of the appraisal is the "fair and reasonable market value" (Section 75 (s), first and unnumbered paragraph), "in accordance with the evidence submitted". Section 75 (s) (3). One device employed in the instant case was to set an appraisal determined by the amount of liens. An attempt was also made to smother out objections that the evidence submitted does not support the valuation fixed by a statement that the evidence submitted was supplemented by the "personal investigation" of the conciliation commissioner. R. 9.

In the same proceeding the appraisal made by the appraisers who were appointed by the conciliation commissioner, and which was approved by him, was $5800. R. 26, bottom of page and R. 27, top of page. Affidavits of appraisers at R. 39 and 40. Three years later, contrary to the evidence submitted, he raised it to $25,200, that is he increased it to a figure four and one-third times the original appraisal. R. 9 ($150 per acre, 168 acres, or $25,200).

This new valuation came about in the following manner. At the end of the three years statutory stay the holder of the first mortgage, the respondent here, filed a motion to terminate the proceeding. About that time this Court in *Wright* v. *Union Central*, 1940, 311 U. S. 273, held that the farmer debtor's statutory right to redeem could not be defeated by a request of the mortgagee for a sale. The District Court then made an order reciting that "the decision of the Supreme Court in the case of *Wright* v. *Union Central Life Insurance Company* should be followed" and directed the conciliation commissioner to determine "the present fair value of such farm" and "determine the correct appraised value and fix a reasonable time" for redemption "failing in which a public sale is ordered." R. 8, order of March 21, 1941. At the hearing the mortgage

holder brought in as witnesses bankers and mortgage holders who invariably gave estimates of value approximating the mortgage liens. The conciliation commissioner then raised the valuation to $25,200, four and one-third times the appraisal of $5800 which he had originally approved.

On the petition for review the judge put it at $20,000, or nearly three and one-half times the original $5800 appraisal. R. 35 to 38. A study of the action of the conciliation commissioner shows beyond any doubt that here a new device was employed to give lip service to the letter of the law but effectually to defeat its purpose by a fictitious valuation. No reasonable mind can conceive such a figure to be the "fair and reasonable market value" especially when no evidence was adduced to show any change in conditions from the time the same conciliation commissioner had fixed it at $5800.

That the conciliation commissioner knew the evidence submitted to him did not support the $25,200 valuation is indicated by his statement that he made a "personal investigation" in addition to the evidence submitted at the hearing.

SECOND DEVICE

The Time for Redemption.

A naked right of redemption is defeated if a reasonable time is not fixed for its consummation.

No farmer debtor can pay his rental and also accumulate sufficient capital in three years of farm operation to redeem his land. Therefore he must negotiate a loan. It is futile to make application for a farm loan before it is known **exactly how much is needed and when.** To do so prematurely may defeat favorable action when the time

is ripe. From application to delivery of funds is usually at least six months, because the title must be abstracted and examined and objections must be met, and finally the title must be approved in addition to completing the money arrangements.

The second device was the conciliation commissioner's order, filed August 6, 1941 (R. 9) effective August 16, which called for redemption by October 15. As no order in a federal court may be effective until after ten days have expired (Rules of Civil Procedure, Rule 62, 28 U. S. C. 874) this order allowed less than sixty days.

The order of the conciliation commissioner was reviewed by the District Court which entered its order of November 17, 1941 (effective November 27) changing the redemption date to December 15, thus giving only eighteen days for redemption. The petition for rehearing was overruled on December 9, leaving but six days. R. 37 and 38. R. 41.

THIRD DEVICE

Prohibition Against Farming.

Prevention of Farm Operations Destroys the Security's Value.

A third device was the conciliation commissioner's order of August 6, 1941, which further prohibited the farmer debtor from "doing any planting of any description until after October 15, 1941". R. 9 and top of page 10. This prohibition is devoid of any power to issue it and therefore a nullity. It is also contrary to the public interest and to natural law, both of which require that agricultural land must be cultivated and planted lest it become a weed pest.

We will now proceed to examine the evidence.

The Evidence on Value.

The Reason for the Valuation Increase to $25,200.

The record of the testimony (R. 10 to 27) shows how the great chasm between $5800 and $25,200 was negotiated. The first, the original, valuation under the first paragraph of Section 75 (s) was conducted free from any suggestion by the mortgage holders and it named the true value of the land. See the statement of the conciliation commissioner at R. 26, bottom of page and top of page 27 and the affidavits of two of the three appraisers at R. 39 to 40. The second valuation under Section 75 (s) (3) was fixed upon the suggestion and testimony of the mortgage holders who considered that the land ought to bring enough to pay the mortgages. This standard is of course unlawful. Nevertheless, the appraisal was increased to four and one-third its original amount.

Some Extrajudicial Evidence.

Apparently recognizing that the evidence submitted to him did not support his $24,200 valuation and to make assurance doubly sure the conciliation commissioner reported to the judge that besides the evidence submitted he went out and made his own "personal investigation." R. 9, bottom of page.

This extraordinary type of procedure is evidence that the conciliation commissioner well knew that the evidence submitted at his hearing did not warrant such a fantastic

valuation. By introducing an unknown and mysterious factor—his "personal investigation"—an attempt was made to knock the props out from any objection that the evidence submitted does not support the valuation of $25,200. This method made the valuation proceeding a nullity by violating a fundamental principle of American jurisprudence—due process of law.

The Method Condemned.

It happened that while this procedure was going on in Ohio another like it was going on in California where the conciliation commissioner was also proceeding to fix the valuation for redemption under Section 75 (s) (3) by his "personal investigation" in addition to the evidence submitted. There also the District Court affirmed the conciliation commissioner. We quote from the opinion of the Circuit Court of appeals for the Ninth Circuit which annulled the valuation:

Moser v. *Mortgage Guarantee Company*, 1941, 123 Fed. (2d) 423:

> The conciliation commissioner's report read in part as follows (quoted from the opinion of the appellate court):
>
> "'After hearing all parties in interest and their appraisers and *after making a personal visit to the ranch and looking the property over and I talked to other property owners in the vicinity*, I came to the conclusion that the property was worth Twelve Thousand Dollars ($12,000) and that is my finding and I accordingly fixed the value at the said amount.'"

The italic emphasis is that of the appellate court.

The opinion of the appellate court says:

"In providing for the hearing the statute prescribes that the commissioner shall 'set a date for the hearing and after such hearing, fix the value of the property in accordance with the evidence submitted. . . .' But the commissioner did not abide by his opening statement nor by this requirement of the statute, for after the hearing he personally proceeded as would an appraiser preparing for a hearing, to gather his own facts and to consider his own impressions therefrom together with the 'evidence submitted.' (No evidence taken outside the hearing is included in the transcript certified to the judge.) The Act does not recognize the conciliation commissioner as a qualified appraiser nor authorize him to act in such capacity and does not authorize him to supplement the 'evidence submitted' with investigations and evidence taking of his own outside the hearing and without the knowledge of the parties to the hearing. In short, the commissioner departed from the statute in a very material and prejudicial manner.

The presentation in person or by deposition of witnesses whose testimony is to be considered, and a reasonable opportunity for cross examination, is implicit in all formal hearings such as the one under consideration. Neither of these requisites of our jurisprudence was afforded in this instance."

"What influence the evidence taken outside the hearing, proper or improper, may have had upon the conclusion reached by the commissioner, or what counter effect cross-examination or rebuttal testimony would have had upon such conclusion, can never be known.

The order appealed from is reversed, annulled and set aside."

This method of reaching judicial conclusions has likewise been recently condemned in the Third Circuit in a

regular bankruptcy proceeding, *In re Aughenbaugh*, 1942, C. C. A. 3, 125 Fed. (2d) 887. There the referee considered papers in the file not introduced in evidence at the hearing. The Appellate court held that such method violates due process of law because the parties to the hearing had no opportunity to explain or refute the outside evidence. It held that in determining an issue the court must consider solely the evidence presented at the trial of that issue.

These circuit decisions are firmly grounded upon the decisions of this court.

In *Interstate Commerce Commission* v. *Louisville*, 1913, 227 U. S. 88, it was held that even a Commission may not go outside the record in concluding an issue because only when evidence is put in the record can a party have an opportunity to "test, explain, or refute" and to "cross examine witnesses and inspect documents and offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

Akron v. *United States* (New England Division case), 1923, 261 U. S. 184, held the same.

In *United States* v. *Abilene*, 1924, 265 U. S. 234, this court again applied the rule saying that "nothing can be treated as evidence which is not introduced as such."

In *Crowell* v. *Benson*, 1932, 285 U. S. 22, it was said that "Facts conceivably known to the deputy commissioner but not put in evidence so as to permit scrutiny and contest, will not support a compensation order. . . . An award not supported by evidence in the record is not in accord with law."

We state quite frankly and unequivocally that the figure of $25,200 was not arrived at by a judicial determination. The evidence does not support it.

A Look at the Mortgage Holder's Theory of Valuation.

It is clear from the evidence submitted by the mortgage holder that the court was expected to fix the value of the farm for redemption with some relation to the amount of the first mortgage and the taxes.

At R. 27, he put in his mortgage debt at $34,702.

The witnesses put on by him gave evidence of the value at figures designed to approximate the amount of the mortgage. They were:

Chamberlain, $33,600, R. 11 ($200 per acre).

Scanlon, exactly the same $33,600. R. 11 ($200 per acre).

Osborn, $31,290 to $33,690. R. 12 ($190 to $200 per acre).

Huddilston, (after hearing the farmer debtor's witnesses at R. 12 to R. 22) dropped to $29,400. R. 23 ($175 per acre).

Cochran, the second mortgage holder (R. 26, bottom of page) who can get nothing until the first mortgage is satisfied, topped them all, and went up to $37,800. R. 26 ($225 per acre).

It is consequently apparent that the mortgage holders expected the conciliation commissioner to sanction an unlawful act by fixing a fictitious valuation that would approximate the first mortgage claim. It is important to

note that the respondent, being **the first mortgage holder, could bid the amount of his $34,702 claim without paying a cent of cash. Any other bidder or the farmer debtor would have to pay the full sum in cash. This does not fix a market value.** But it does prevent redemption.

This illegal scheme would place a two-edged sword in the hands of the mortgage holders. One edge would by a false valuation prevent redemption; the other would force a public sale at which, by bidding the mortgage claim, the farmer debtor and any other bidder would be cut off from bidding. Either edge is **calculated to cheat the law by depriving the farmer debtor of his right to redeem.**

Its success would effectually reverse this court's decision in *Wright* v. *Union Central*, 1940, 311 U. S. 273, through the device of a fictitious valuation which would defeat redemption and thus force a public sale.

The Statutory Standard of Value.

When the law is examined by which such a method of valuation is to be measured we find:

Section 75 (s) at the end of the first paragraph reads:

> "Such appraisers shall appraise all of the property of the debtor, wherever located, at its **then fair and reasonable market value**".

That provision refers to the appraisal made at the beginning of the three year stay under Section 75 (s) which was set by the conciliation commissioner at $5800. R. 27.

At Section 75 (s) (3), the law provides that:

> "Upon the request of any secured or unsecured creditor, or upon request of the debtor, the court shall

> cause a **reappraisal** of the debtor's property, or in its discretion set a date for hearing, and after such hearing **fix the value of the property, in accordance with the evidence submitted.**"

That is, the debtor may redeem his farm at its "**fair and reasonable market value**" which has been fixed "in accordance with the **evidence submitted.**"

The mortgage holders throughout the country up to the decision in *Wright* v. *Union Central*, decided December 9, 1940, 311 U. S. 273, had been violating the law by asking, and getting, a public sale to defeat the debtor's right to redeem. Here the respondent following the well-worn path, asked the bankruptcy court in this case to do the same thing—that is, to ignore the debtor's right to redeem at the "fair and reasonable market value" by holding a public sale at which the mortgage holder could, without using money, bid the amount of his mortgage claim. Because of that intervening decision the District Court held that the statute must be observed and ordered the conciliation commissioner to fix the valuation. R. 8 to 9, order of March 21, 1941.

This legal history explains the peculiar gyrations of the respondent's evidence presented to the conciliation commissioner. Though *Wright* v. *Union Central*, 1940, 311 U. S. 273, was expected to restore the right of redemption to all farmer debtors, this new device was promptly put to work to accomplish the same object as the device which this Court wrecked.

An Examination of the Evidence Submitted At the Hearing.

There is a wide cleavage between two distinct types of evidence adduced at the hearing before the conciliation commissioner which may be grouped as follows:

The Mortgage Holder's Evidence.

First, there is the evidence of the mortgage holders based upon the theory that the valuation should be determined by the amount of the liens on the property. In putting in the amount of his first mortgage at $34,702 (R. 27) the respondent showed his adherence to this theory. By statute it was irrelevant. The second mortgage holder, Cochran, showed the same attitude and put his testimony enough higher to cover well his claim of more than $2,000. (R. 26.) He valued the property up to $37,800. (R. 26.) The testimony of Chamberlain (R. 10 to 11), an official in two banks, **who did not go on the farm**, fixed the value at $33,600. Scanlon (R. 11 to 12), who is not a farmer and had not lived on a farm for fifty years, fixed it at $33,674. Osborn (R. 12) **who did not go on the farm**, set it at from $31,920 to $33,600. Huddilston (R. 22 to 24), **who had not been on the farm for five years** and who says he sold 33 acres at $14,000 or over $400 per acre in Sagamore Hills, (See map at debtor's Exhibit 1 at R. 28), a high class residence section of metropolitan Cleveland, went back to $29,400 after hearing the farmer debtor's witnesses at R. 12 to 22.

All showed the same basis of value—the amount of claims against the farm.

In several instances the mortgage holders asked questions like this: Do you know that such and such a farm was offered for such and such a price? The figure was always a high one. Of course this is not evidence. The mention of a supposed "offer" can only confuse unless it is backed up with evidence. Otherwise it is plain bluff. Evidence showing that an offer had been made to sell a farm for $230 an acre would be evidence that its value probably was no higher or the price would be higher. If actually offered and there were inquiries but no taker it would tend to prove that the price was too high—nothing more. To say to a witness "Do you know that the National Press Building was offered at a billion dollars?" is no evidence of its value.

Such was the evidence of value submitted by the respondent.

The Evidence of Other Witnesses.

Second, there is the evidence of the witnesses who had no other interest or motive than to arrive at the "fair and reasonable market value" of this farm.

Mr. Howard

R. 12 to 14

Mr. Howard had no interest in the case. He is City Planner of the Regional Association of Cleveland. He has made an extended study of that metropolitan district and

has published several works on the subject. He shows that this farm lying near the line between Cuyahoga and Summit Counties (R. 28, See Macedonia which is encircled in red on the map) can have no site value. There are already 40,000 acres of vacant un-subdivided land in Cuyahoga County. There are 80,000 acres of farms like the Carter farm which could also be subdivided. There are now 28,000 vacant lots already subdivided which would house 500,000 people. (At the same ratio the already available home site land would provide for an additional total population of 2,500,000. Before the 80,000 acres of possible farm land would be in competition, the 28,000 acres plus 40,000 acres (68,000 acres) alone would provide for a population of 1,180,000.) There are also 160,000 tax delinquent lots in the county. He also testified that the proportion of all these figures for the vicinity of this farm is higher than for the County as a whole.

For Summit County of course the amount of available farm land which is available for residence purposes is very much larger.

The United States population census shows Cuyahoga County, 1930, 1,201,455; 1940, 1,217,250 (an increase of about 16,000 in ten years). Summit County, 1930, 344,131; 1940, 339,405 (a decrease of about 4,000).

MR. ADAMS

R. 14

Mr. Adams had no interest in the case. He has owned farms and been a farmer all his life and still owns over 400 acres. He has offered his farm at $40 to $50 an acre and

has not been able to sell it although buyers have looked at it. He has been over the Carter farm and he valued it at $50 an acre or $8418.

Mr. Eagle
R. 15 to 16

Mr. Eagle is not interested in the case. He is a farmer and an appraiser of wide experience for the government and for federal land banks. He took samples of the soil as in his official appraisals. He went over every part of the farm and found some good soil. He found much light top soil with a very heavy subsoil that is very poor. Much of it is stony and underlaid with rock. He found about one-third of the peach trees frozen out and without value, leaving but two and two-thirds acres of peaches. The house roof is about gone—the singles curling up. His valuation is $7795.00 or about $46 per acre.

Mr. Huber
R. 17 to 19

Mr. Huber had no interest in the case. He has been a farm real estate dealer for more than thirty years and has sold hundreds of farms, many in this very community. He went over the farm. It has no scenic value whatever. Because it is situated between the two cities, although he had serious doubts, he added some to what he deemed the real value to be. He named $12,040, or $71.66 per acre.

MR. PLECHATY
R. 21 to 22

Mr. Plechaty has been a farmer for fourteen years. He was a farm real estate dealer for many years in this part of the state. He was looking for a farm in the vicinity for himself last year until he bought the Bowman farm nearby.

Of this Bowman farm Mr. Huber had testified, (R. 19), that "It had about 98 acres and he sold it to Plechaty for $12,000. It had excellent buildings, the barn 'being one that nobody would want to build'. The house has three baths, vapor heat, and is in very good condition. It also had spring water running by gravity right into the barn and house, and in the orchard on out to the creek."

Mr. Plechaty has been on the Carter farm and knows it. He knows other farms nearby that are for sale. He values the Carter farm at $6500 to $8500, or about $39 to $50 per acre.

The Two Valuation Theories Compared.

There can be but one conclusion in considering these valuations running from $6500 to $12,400 by the disinterested witnesses, and from $29,464 to $37,883 by the mortgage holders. The disinterested witnesses were confronted with the difficult job of fixing the actual value of the farm as it is now. They were not subject to any other consideration. The mortgage holder's witnesses were thinking of what **the value should be in relation to the mortgage claims.** They were concerned with a value that would freeze out the debtor from his right of redemption under Section 75 (s).

The court can not accede to such a scheme without stultifying the laws of the United States and the decisions of this court.

CONCLUSION.

The method of valuation for the purpose of redemption provided in Section 75 (s) (3) of the farmer debtor law is violated by the method employed by the bankruptcy court, and sustained by the appellate court on the theory there was no abuse of "judicial discretion."

The effect of the methods pursued presents an important question concerning the administration of the statute.

The method of the conciliation commissioner in fixing valuation by his "personal investigation" as sustained by the courts below is in conflict with the decisions in other circuits and with the decisions of this court.

If the purpose of the farmer debtor law, which is to afford to the farmer debtor an honest opportunity to redeem his farm at its present real market value, is to be thwarted by merely setting up a fictitious valuation which will force a public sale at which the mortgage holder may without paying cash bid the amount of his lien, then the decision of this court in *Wright* v. *Union Central*, 1940, 311 U. S. 273, is overruled and the farmer debtor law is innocuous to holders of farm mortgages which overtop the value of their security—the mortgage holders may take the farms.

Wherefore your petitioner prays that a writ of certiorari may issue.

Respectfully submitted,
ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner.

Lima, Ohio
February 6, 1943